RECENT CASES

BANKRUPTCY—COSTS AND FEES—COMPENSATION OF REFEREE IN BANKRUPTCY UNDER COMPOSITION AGREEMENT WHERE "AMOUNT TO BE PAID" IS PARTLY PROMISES TO PAY—A bankrupt corporation entered into a composition agreement with its creditors, whereby it agreed to pay fifteen *per cent.* of its obligations in cash and to issue bonds of the corporation for the remaining eighty-five *per cent.* The offer in composition was confirmed by the court. The Bankruptcy Act provides that referees shall receive as compensation one-half of one *per cent.* on the "amount to be paid" to creditors upon the confirmation of the composition.[1] The referee appealed from an order of the District Court awarding him compensation on the basis of the present estimated value of the bonds and the cash agreed to be paid. *Held,*[2] that the order be modified so as to award compensation on the basis of the face value of the bonds plus the cash agreed to be paid, since "amount to be paid" means the amount which the bankrupt promises to pay, the compensation of the referee being independent of the fulfillment of the promises. In re *Realty Associates Securities Corp.*, 74 F. (2d) 61 (C. C. A. 2d, 1934).

The instant case represents probably the first definitive interpretation of the clause in question. The intent of Congress in enacting the provision must remain problematical; but the majority opinion would appear to indicate an undue prejudice in favor of the referee at the expense of the creditors.

BANKRUPTCY—SECTION 77—POWER OF COURT TO RESTRAIN SALE OF COLLATERAL BY PLEDGEE—After the debtor had filed a petition under Section 77 of the Bankruptcy Act,[1] the court enjoined the sale of collateral previously pledged by the debtor under an agreement that the securities might be sold upon default in payment of interest or upon the appointment of a receiver. Collateral of a face value of $54,000,000 had been pledged to secure a debt of $18,000,000. On appeal, *held,* that the bankruptcy court had jurisdiction of the property, and that it might enjoin the sale of the securities pending reorganization. *Continental Illinois Nat. Bank and Trust Co. of Chicago v. Chicago, Rock Island, and Pac. Ry.*, U. S. L. Week, April 2, 1935, at 31 (Sup. Ct. 1935).

Prior to the recent amendments to the Bankruptcy Act, a bankruptcy court had jurisdiction to enjoin the foreclosure of a mortgage,[2] but not to enjoin the sale of pledged securities in accordance with the terms of the pledge contract.[3] As Section 77 provides that the jurisdiction of the court shall be the same with respect to the debtor and his property as if a voluntary petition for adjudication had been filed and decree of adjudication entered,[4] it was argued that pos-

1. 32 STAT. 799 (1903), 11 U. S. C. A. § 68 (a) (1927).

2. Augustus N. Hand, J., dissented, voting for affirmance of the order of the district court, on the ground that "amount to be paid" refers to the actual value of the property which creditors are to receive at the time when the order of confirmation is made.

1. 47 STAT. 1474 (1933), 11 U. S. C. A. § 205 (Supp. 1934).

2. *In re* Jersey Island Packing Co., 138 Fed. 625 (C. C. A. 9th, 1905); see Isaacs v. Hobbs Tie and Timber Co., 282 U. S. 734, 738 (1931).

3. Hiscock v. Varick Bank, 206 U. S. 28 (1907); see *In re* Hudson River Navigation Corp., 57 F. (2d) 175 (C. C. A. 2d, 1932). In the presence of special circumstances, an injunction may be granted. *In re* Mitchell, 278 Fed. 707 (C. C. A. 2d, 1922); *In re* Purkett, Douglas & Co., 50 F. (2d) 435 (S. D. Cal. 1931). *Contra: In re* Henry, 50 F. (2d) 453 (E. D. Pa. 1931).

4. 47 STAT. 1481, § 77 (n) (1933), 11 U. S. C. A. § 205 (n) (Supp. 1934).

session or right to possession by the debtor was still a prerequisite to the court's jurisdiction. Nor did the provisions of Section 77 authorizing the bankruptcy court to stay "pending suits" or "judicial proceedings to enforce any lien" [5] aid the Court, for it has been held that a sale under a pledge agreement does not constitute "judicial proceedings." [6] However, the Court held that the equity of the debtor in the pledged securities was property within Section 77 (a), which grants bankruptcy courts jurisdiction over the property of the debtor wherever located, and that the injunction was reasonably related to the protection of that property. Before reaching this result, the Court held that Section 77 in its general plan was within the power granted Congress to enact uniform laws on the subject of bankruptcies; that the extension of a bankruptcy law to corporations having more assets than liabilities but unable to pay debts as they mature was only a liberalization of the bankruptcy concept, and that the procedure enacted did not differ materially from compositions.[7] Undoubtedly, the result reached in the instant case will make reorganizations less difficult. It will also, however, cause lenders to exact more stringent terms before advancing credit to railroads and corporations in poor financial condition, in view of the fact that creditors are deprived of the power of sale on appointment of a receiver, normally the most effective remedy in a contract of pledge.[8]

BANKRUPTCY—SECTION 77B—PLAN OF LIQUIDATION AS REORGANIZATION —Debtor, at a time when the value of its assets was less than the amount due on mortgage bonds issued under a trust indenture and when the debtor was in default, transferred its assets to the trustee under the indenture. Debtor sought relief under Section 77B of the Bankruptcy Act [1] with a plan providing for liquidation over a five to ten-year period, with no provision for the transaction of any new business.[2] Each bondholder was to receive participation certificates in the new corporation entitling him to the proceeds of the assets applicable to his claim. Although the plan was accepted by ninety-four *per cent.* of the bondholders, the trustee intervened in the proceedings to protect himself against possible claims by the non-assenting six *per cent.* and to contest the validity of the court's order directing the trustee to transfer the security held by it to the new corporation. *Held,* that the plan of liquidation constituted a reorganization under Section 77B even though debtor had no equity in the property, and that the court might constitutionally order the trustee to transfer the property to the new corporation. In re *Central Funding Corp.,* U. S. L. Week, March 12, at 21 (C. C. A. 2d, 1935).

As the purpose of Section 77B is apparently to readjust creditors' rights rather than to relieve debtors, the section should apply to a debtor having no equity in its property as well as to one which cannot pay its debts as they mature. 77B was intended primarily to save the "going concern" value of a corporation; [3] yet it has been applied to corporations which have lost their charters.[4] In holding a plan of liquidation a reorganization the instant court re-

5. 47 STAT. 1481, § 77 (l) (1933), 11 U. S. C. A. § 205 (l) (Supp. 1934).

6. *In re* Doelger, reported in 9 A. B. REV. 329 (D. C. S. D. N. Y. 1933).

7. *In re* Reiman, 20 Fed. Cas. No. 11,673, at 490 (S. D. N. Y. 1874), cited in Hanover Nat. Bank v. Moyses, 186 U. S. 181 (1902); see Weiner, *Reorganization under Section 77* (1933) 33 COL. L. REV. 834.

8. See (1935) 44 YALE L. J. 677; (1934) 34 COL. L. REV. 109.

1. 48 STAT. 911 (1933), 11 U. S. C. A. § 207 (Supp. 1934).

2. For the general plan of reorganization of the National Surety Company, of which the debtor was a subsidiary, see (1934) 43 YALE L. J. 1146.

3. H. R. REP. No. 194, 73d Cong., 1st Sess. (1933).

4. *In re* 211 East Delaware Place Bldg. Corp., 7 Supp. 892 (E. D. Ill. 1934), (1935) 48 HARV. L. REV. 676; *In re* Surf Building Corp., D. Ill., Oct. 17, 1934.

garded the fact that the new corporation would not do business as subordinate to the fact that the company would continue to hold the debtor's property and would liquidate it. The trustee argued that, granting such a plan to be within the intent of Section 77B, the wording of the statute does not give the bankruptcy court jurisdiction over property to which the debtor has neither title nor possession.[5] There is justification for this argument. Section 77B gives the court jurisdiction of the property of the debtor wherever situated,[6] but the object of this section was clearly to confer on the court nationwide jurisdiction, not power to change the substantive rights of creditors.[7] Congress, believing that similar language in Section 74 [8] of the Act, enacted at the same time as 77B, did not extend to such property, amended Section 74 expressly to cover this situation.[9] However, Section 77B (h) gives the court power to order the trustee of any obligation of the debtor to transfer any property in his hands to the new corporation.[10] This subsection the trustee in the instant case attacked as unconstitutional on the ground that it involved a taking of property without due process of law, and so was outside the bankruptcy powers of Congress. However, bankruptcy, though limited by statute to certain acts and methods,[11] includes all the relations of an embarrassed debtor to his creditors,[12] and this section appears reasonably related to a method of distribution of assets of a debtor among his creditors. Nor does the fact that creditors' claims are secured bear materially upon the constitutionality of the provision; for bankruptcy necessarily involves a "taking of property." [13] Secured and unsecured claims differ only in degree, and Congress admittedly can legislate as to the latter.[14]

BANKS AND BANKING—SET-OFF—RIGHT OF BANK TO SET OFF A MATURED NOTE AGAINST A DEPOSIT IN A SUIT BY GARNISHOR—Defendant bank was the holder of a demand note of the depositor. The note specifically gave the bank a lien on all funds, *etc.*, which belonged to the depositor and came into the bank's hands. Plaintiff secured a judgment against depositor, then brought this garnishment proceeding. The bank attempted to set off the note against the deposit. *Held,* that the bank could set off the demand note against the attaching creditor. *Bergman Building & Loan Ass'n v. Blaul,* (Pa., March 25, 1935).

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5. *Cf. In re* 1030 North Dearborn Bldg. Corp., 7 F. Supp. 896 (E. D. Ill. 1934).

6. 48 STAT. 912 (1934), 11 U. S. C. A. § 207 (a) (Supp. 1934). *Cf.* Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, Rock Island & Pac. Ry., U. S. L. Week, April 2, 1935, at 31 (Sup. Ct. 1935), *supra* p. 913.

7. In an equity reorganization, the court had no jurisdiction over such property. Greenbaum v. General Forbes Hotel Co., 38 F. (2d) 96 (W. D. Pa. 1930); see Brackett v. Middlesex Banking Co., 89 Conn. 645, 654, 95 Atl. 12, 15 (1915). Section 77B (a) confers on the court the same power as a court of equity had in an equity receivership.

8. 47 STAT. 1467 (1933), 11 U. S. C. A. § 212 (m) (Supp. 1934).

9. 48 STAT. 922 (1933), 11 U. S. C. A. § 202 (m) (Supp. 1934).

10. 48 STAT. 920 (1933), 11 U. S. C. A. § 207 (h) (Supp. 1934).

11. See Kaplan, *Is Section 77B a Proper Part of a Bankruptcy Act?* (1935) 21 A. B. A. J. 47.

12. Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, Rock Island & Pacific Ry., U. S. L. Week, April 2, 1935, at 31 (Sup. Ct. 1935), cited note 6, *supra.*

13. Campbell v. Alleghany Corp., C. C. A. 4th, March 2, 1935; see Gerdes, *Constitutionality of Section 77B of the Bankruptcy Act* (1934) 12 N. Y. U. L. Q. REV. 196; Rodgers and Groom, *Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act* (1933) 33 COL. L. REV. 571, 576. But see: Stebbins, *Constitutionality of Recent Amendment to the Bankruptcy Law* (1933) 17 MARQ. L. REV. 163.

14. Gerdes, *supra* note 13, at 206.

As was indicated in a discussion of the same case in the Superior Court, contained in a previous issue of this REVIEW,[1] Pennsylvania had been out of line with logic as well as with other jurisdictions in refusing to allow a bank to set off a matured loan against an attaching creditor. The instant decision reversed the Superior Court and expressly overruled prior authority, to adopt generally accepted principles of set-off.

CONDITIONAL SALES—FIXTURES—RIGHTS OF A CONDITIONAL SALE VENDOR IN CHATTELS AFFIXED TO REALTY AS AGAINST AN UNASSENTING PRIOR MORTGAGEE—Certain machinery, the major portion of which was not physically attached to the building, was installed by plaintiff vendor under an unrecorded conditional sale contract, and was used to manufacture approximately half of the total output of defendant's factory. On appointment of receivers for defendant company, plaintiff petitioned for the return of the machinery and was opposed by the holder of a mortgage on the plant, executed prior to the conditional sale. Section 7 of the Conditional Sales Act, which was in force, provided *inter alia* that "As against . . . a prior mortgagee . . . who has not assented to the reservation of property in the goods, if any of the goods are so attached to the realty as not to be severable without material injury to the freehold, the reservation of property . . . shall be void, notwithstanding the filing of the contract . . . ."[1] *Held,* that the machinery was subject to the prior mortgage lien on the real estate, since its removal would result in material injury to the plant as an operating unit. *Central Lithograph Co. v. Eatmor Chocolate Co.,* 175 Atl. 697 (Pa. 1934).

The increasing jurisdictional divergence of opinion as to the interpretation of the phrase "material injury to the freehold",[2] used in Section 7 of the Uniform Conditional Sales Act, would seem particularly surprising in view of the fact that the draftsmen of the Act have clearly indicated the meaning intended by the disputed language,[3] were it not for Anglo-American experience with the process of judicial legislation. The majority of courts, in accordance with the intention of the draftsmen to perpetuate a common law rule in the field of fixtures,[4] have given the words their literal application as meaning material injury to the realty to which the chattels are annexed.[5] Other jurisdictions, however, have construed the phrase variously as equivalent to "substantial diminution of the mortgagee's security",[6] or "material injury to the institution of which the

1. (1935) 83 U. OF PA. L. REV. 789.

1. PA. STAT. ANN. (Purdon, 1930) tit. 69, § 404 (2).

2. Notes (1934) 18 MINN. L. REV. 812, 88 A. L. R. 1318.

3. 2 A. UNIFORM LAWS ANNOTATED (1924) § 66.

4. Whether at common law a fixture became realty or retained the legal characteristics of personalty was, as between the parties, a question of intention. Where third parties' rights were involved, intention was subordinated to the question of whether the fixtures could be severed without material injury to the realty. 2 A. UNIFORM LAWS ANNOTATED (1924) § 66. Since the Uniform Conditional Sales Act, intention has been considered immaterial. Bank of America Nat. Ass'n v. La Reine Hotel Corp., 108 N. J. Eq. 567, 156 Atl. 28 (1931); People's Savings & Trust Co. v. Munsert, 212 Wis. 449, 249 N. W. 527 (1933). *Contra:* American Laundry Mach. Co. v. Miners Trust Co., 307 Pa. 395, 161 Atl. 306 (1932).

5. Detroit Steel Co. v. Sistersville Brew. Co., 233 U. S. 712 (1914); Buss Mach. Works v. Watsontown Door & Sash Co., 2 F. Supp. 758 (D. C. Pa. 1933); Prisco & Soverio v. Bifulco Bros., 234 App. Div. 122, 254 N. Y. Supp. 459 (2d Dep't 1931); People's Savings & Trust Co. v. Munsert, 212 Wis. 449, 249 N. W. 527 (1933).

6. Dauch v. Ginsburg, 214 Cal. 540, 6 P. (2d) 952 (1931); Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753 (1889). In considering whether the mortgagee's interest has been diminished, court sometimes consider the injury to the building and at other times the injury to the institution.

fixtures are a part." [7] In interpreting "freehold" to include all fixtures in a plant which are necessary to its operation as a complete going concern, the Pennsylvania court has unequivocally allied itself [8] with the few exponents of the "institutional" theory, of which New Jersey was hitherto the leading proponent. The criticism directed against this theory has been that the mortgagee, having advanced nothing in reliance on the value of the subsequently annexed fixtures, should not be permitted to enhance his original security as against the expression of a contrary intention by the parties installing the chattels, who have agreed that title should be reserved in the vendor.[9] This argument, however, assumes that the mortgagor-mortgagee relationship contemplates the restriction of the security to the property in its physical condition as of the time it was pledged—a dubious assumption in cases where the security is an industrial concern whose chief value is its attribute as a business institution. The equity in permitting the mortgagee to take advantage of normal improvements is even more forceful when it is realized that he, almost alone, bears the loss of depreciation and unfavorable market fluctuations.[10] Nor is the conditional sale vendor left without protection, as is frequently supposed,[11] since he may adequately secure himself by obtaining the readily procured assent of the mortgagee to his reservation of title.[12]

CONFLICT OF LAWS—CONTRACTS—EFFECT OF RUSSIAN DECREE TERMINATING A DEBTOR'S OBLIGATION WITHOUT COMPENSATION TO THE CREDITOR—Defendant insurance company, incorporated in the United States, sold life insurance policies in Russia to Russian citizens, which were payable in Russia, and which contained a provision that all disputes should be decided in Russian courts, in accordance with Russian law. After the sale of the policies in suit, the Soviet Government came into power, and issued decrees nationalizing the insurance business, confiscating all the assets of defendant company, and terminating its right to do business in Russia. Russian policyholders brought suit on the policies in New York, some seeking recovery of premiums paid, and others seek-

7. *In re* Moultrie Creamery & Produce Co., 2 F. (2d) 129 (C. C. A. 5th, 1924); MacLeod v. Satterthwait, 109 N. J. Eq. 414, 157 Atl. 670 (1932); Russ Distributing Co. v. Lichtman, 111 N. J. L. 21, 166 Atl. 513 (1933). In a recent New Jersey case, a variation of the institutional view was adopted by the inquiry of the court into whether the fixture was a "device for the rendering of service to the occupants" of the building. Independent Aetna Sprinkler Corp. v. Morris, 114 N. J. L. 23, 175 Atl. 102 (1934), (1935) 48 HARV. L. REV. 857.

8. There had been frequent expressions in earlier Pennsylvania cases indicating a tendency in this direction. See Voorhis v. Freeman, 2 W. & S. 116, 119 (Pa. 1841); Commonwealth Trust Co. v. Harkins, 312 Pa. 402, 406, 167 Atl. 278, 280 (1933). Some Pennsylvania cases, however, have been cited for the majority view. American Laundry Mach. Co. v. Miners Trust Co., 307 Pa. 395, 161 Atl. 306 (1932), cited in (1935) 48 HARV. L. REV. 857, 858.

9. Northwestern Mutual Life Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028 (1899); People's Sav. & Trust Co. v. Munsert, 212 Wis. 449, 249 N. W. 527 (1933).

10. Roberts v. Dauphin Deposite Bank, 19 Pa. 71 (1852); Pennsylvania Chocolate Co. v. Hershey Bros., 175 Atl. 694 (Pa. 1934).

11. (1932) 20 CALIF. L. REV. 567.

12. The mortgagee as a general rule has no reason to withhold his consent, since the annexation of the fixtures will in any event add to the likelihood that the value of the business as a going concern will be increased and the mortgage debt repaid, whereas withholding consent would in many cases result in failure to install desirable improvements. In addition, the mortgagee can assure himself against loss from damage to the building by requiring a bond to that effect, in accordance with the Pennsylvania statute and the judicial expressions of other jurisdictions. PA. STAT. ANN. (Purdon, 1930) tit. 69, § 404 (2); Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753 (1889); Roddy v. Munson, 44 N. J. Eq. 244 (1888). As against subsequent mortgagees, the vendor who files the conditional sale contract is fully protected. PA. STAT. ANN. (Purdon, 1930) tit. 69, § 404 (1).

ing the face value of endowment policies which had matured. *Held* (one Justice dissenting), that because the company's obligation had been cancelled by the Russian decrees, the plaintiffs are barred from recovery. *Dougherty v. Equitable Life Assurance Society,* 193 N. E. 897 (N. Y. 1934).

Several theories have been formulated to determine which law a court should apply in the determination of contract cases involving a foreign jurisdiction. One is that the intent of the contracting parties should be conclusive.[1] Another is that the law of the place of making the contract should determine its validity and the nature and extent of its obligations, while the law of the place of performance should regulate performance, breach, measure of damages, legal impossibility of performance, *etc.*[2] Still a third view is that a court will apply either the law of the place of making or the law of the place of performance, depending upon which will enable it to uphold the validity of the contract in the particular case.[3] Since, in the instant case, the contract expressly stipulated for the application of Russian law, and since both the place of making and place of performance were in Russia, the decision seems to be almost inevitable, for the same result would have been reached by the application of any of the three theories mentioned. Yet the majority opinion is long and labored, and there is a vigorous dissent. The real significance of the decision can be appreciated only by noting the specific question involved, and how it had been answered by earlier cases. The debatable question was whether the usual conflict of laws rules, turning on place of making, place of performance, or intent, should be applied where their application would require the court to give effect to a foreign decree confiscating or destroying a person's chose in action, without giving him any reasonable compensation therefor.[4] After all, such a decree is not only shockingly different from the common law and statutory law of the United States, but even conflicts with its constitutional law.[5] The real force of this "shock" to the judicial mind is revealed by the cases, for, in almost every case in which an American or English court was called upon to give effect to such a decree, but in which either the law of the place of making or that of the place of performance would permit recovery, it was allowed.[6] The instant

1. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565, 576.

2. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 332, 358, 360.

3. Lorenzen, *supra* note 1, at 672, 673.

4. An attempt to confiscate or to terminate a chose in action must be distinguished from an attempt to confiscate tangible chattels or persons. It is well settled that if a foreign government confiscates tangible goods within its territorial jurisdiction and sells them, the purchaser's title is valid in any country to which he may remove the chattel. Oetjen v. Central Leather Co., 246 U. S. 297 (1918); Aksionairnoye Obschestvo, *etc.* A. M. Luther v. James Sagor & Co., [1921] 3 K. B. 532. And neither he nor the foreign government is liable for the value of the goods confiscated. Wolfsohn v. Russian Socialist Federated Republic, 234 N. Y. 372, 138 N. E. 24 (1923); M. Salimoff & Co. v. Standard Oil Co., 262 N. Y. 220, 186 N. E. 679 (1933). But these cases rest on the fact that the property dealt with was within the territorial jurisdiction of the government dealing with it. No analogy can be fairly drawn from such cases to cases involving seizure of debts or choses in action, for the reason that intangible property cannot have any actual physical presence in any given territory. For some purposes a debt has been said to be situated at the creditor's domicile. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) (taxation). And for others, at the debtor's domicile. Security Savings Bank v. California, 263 U. S. 282 (1923) (escheat). In Severnoe Securities Corp. v. London & Lancashire Ins. Co., 255 N. Y. 120, 174 N. E. 299 (1931), Chief Justice Cardozo pointed out with rare frankness that in every case a court's choice of *situs* for intangible property is in fact largely determined by reasons of convenience, public policy, justice, *etc.*

5. As an impairment of the obligations of contracts, and also as a deprivation of property without due process of law. Western Nat. Bank v. Reckless, 96 Fed. 70 (D. N. J. 1899); Lamb v. Powder River Live Stock Co., 132 Fed. 434 (C. C. A. 8th, 1904).

6. Sokoloff v. National City Bank, 239 N. Y. 158, 145 N. E. 917 (1924); James & Co. v. Second Russian Ins. Co., 239 N. Y. 248, 146 N. E. 369 (1925); *In re* Russian Bank for

case is the first involving a foreign decree of confiscation in which the law of neither place would permit recovery,[7] so that its decision represents a significant contribution to the law of cases involving this type of decree. Of much deeper significance, however, is the fact that this decision represents a real triumph by a court over national provincialism. Such provincialism had manifested itself in other conflict of laws decisions,[8] and might well have prevailed in so extreme a case as this one.

CONFLICT OF LAWS—RIGHTS AND REMEDIES—STATUTE OF FRAUDS—Defendant sold certain securities to plaintiffs, agreeing to repurchase them at plaintiffs' option after the lapse of a three-year period. The agreement, which was made in New York, was embodied in a letter signed by the agent of defendant, whose authority to make the contract was not in writing. Plaintiffs brought suit on the contract in Delaware, alleging that the contract was within the New York Statute of Frauds.[1] The defendant set up the Statute of Frauds of Delaware, which provides that "no action shall be brought" unless the contract is set forth in a writing signed by the party sought to be charged or by some person lawfully authorized in writing.[2] *Held,* that the Delaware statute was not a matter of procedure but one of substance, and that suit might be therefore maintained on the contract in Delaware. *Lams v. F. H. Smith Co.,* Del. Super. Ct., March 13, 1935.

Perhaps there is no place in the field of Conflict of Laws where the necessity for distinguishing between substance and procedure becomes more acute than in controversies involving the Statute of Frauds.[3] *Leroux v. Brown,*[4] the most-cited case in point, announced that a distinction was to be taken between that section of the English statute which provided that "no action shall be brought"—language identical with the statute in the instant case—and the section providing that "no contract shall be allowed to be good." It was said that the former section stated a procedural requirement of English law, so that a contract which failed to comply therewith, though completely enforceable by the law of the place of contracting, was not enforceable in England; the latter section was said to state a substantive requirement, inapplicable to foreign contracts. The distinction, however, has been challenged as purely stylistic and without basis in actual legislative intent.[5] Some American cases have none-

Foreign Trade [1933] 1 Ch. 745. In the James case, the court was concerned with a decree of the Soviet government before it had been accorded recognition by the United States, but the opinion expressly states, by way of *dictum,* that the decision would have been the same even if recognition had been already accorded. Still another case purports to rest on one ground, and then expressly states that even in the absence of this ground, it would not extend any comity to a confiscatory act of a foreign government. Frenkel & Co., Inc. v. L'Urbaine Fire Ins. Co., 251 N. Y. 243, 167 N. E. 430 (1929).

7. In Zimmerman v. Sutherland, 274 U. S. 253 (1927), the court denied recovery to the plaintiff, applying the law of Austria-Hungary, which had been both the place of making and that of performance. But here the Austrian law in question was not confiscatory, for it merely provided that, in case of dispute between debtor and creditor, the debtor could discharge his liability by paying into a designated bank the sum which he admitted to be due.

8. See, for example, Union Trust Co. v. Grossman, 245 U. S. 412 (1918); Oceanic Steam Navigation Co. v. Corcoran, 9 F. (2d) 724 (C. C. A. 2d, 1925).

1. N. Y. PERS. PROP. LAW (1917) § 31.

2. DEL. REV. STAT. (1915) § 2626.

3. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws,* 78 U. OF PA. L. REV. 933; Note (1933) 47 HARV. L. REV. 315.

4. 12 C. B. 801 (Eng. 1852).

5. See Townsend v. Hargraves, 118 Mass. 325, 334 (1875) (holding the statute remedial); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 145, 162 N. W. 1082, 1085 (1917) (holding the statute substantive); Note (1893) 19 L. R. A. 792; *dictum* of Wil-

theless adopted it.[6] Others, while rejecting the distinction, have been divided as to whether the statute as a whole is procedural,[7] or substantive.[8] It seems clear that the holding of the instant case represents the better treatment of the Statute of Frauds, (1) logically, from the standpoint of the legal incidents which the courts have attached to the ordinary case in which the statute is applicable;[9] and (2) practically, in the commercial convenience which results from being able to ascertain at once whether a given contract is defective with regard to the statute, regardless of where suit may be brought.[10] Finally, adoption of the foreign statute would not seem to occasion the forum more inconvenience than does the recognition of any other "operative" fact.[11]

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF FEDERAL STATUTE PERMITTING INSOLVENT PUBLIC DEBTORS TO MAKE READJUSTMENT OF THEIR OBLIGATIONS—The Sumners Act[1] amended the Bankruptcy Act[2] to permit insolvent political subdivisions of any state to file a petition in a federal court for readjustment of their debts. Petitioner, an irrigation district created by Texas statute,[3] which had issued bonds payable from funds to be raised by taxation, filed a petition in a federal court under the Sumners Act, alleging inability to meet its obligations. Contestants, owners of petitioner's bonds, intervened. *Held,* that the Sumners Act is unconstitutional, as the power of Congress to enact bankruptcy legislation[4] cannot be used to impede the sovereignty of the states in respect to their fiscal policies. In re *Cameron County Water Improvement District No. 1,* 9 F. Supp. 103 (S. D. Tex. 1934).

The fundamental concept of the American system is that neither the national nor the state government may impair the other's sovereignty, as each is supreme within its sphere of action.[5] On this theory, the famous case of *Collector v. Day*[6] held that the United States cannot tax a state agency.[7] In the instant case,

les, J., in Williams v. Wheeler, 8 C. B. (N. S.) 299, 316 (Eng. 1860), indicating that the repudiation of the distinction should be in favor of a substantive interpretation.

6. Kleeman & Co. v. Collins, 9 Bush 460 (Ky. 1879); Third Nat. Bank of N. Y. v. Steel, 129 Mich. 434, 88 N. W. 1050 (1902). But see 1 WILLISTON, CONTRACTS (1920) § 525.

7. Buhl v. Stephens, 84 Fed. 922 (C. C. D. Ind. 1898); Townsend v. Hargraves, 118 Mass. 325 (1875); Heaton v. Eldridge & Higgins, 56 Ohio St. 87, 46 N. E. 638 (1897); *cf.* Straesser-Arnold Co. v. Franklin Sugar Refining Co., 8 F. (2d) 601 (C. C. A. 7th, 1925), *cert. denied,* 270 U. S. 642 (1925).

8. Franklin Sugar Refining Co. v. William D. Mullen Co., 7 F. (2d) 470 (D. Del. 1925); Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, *rehearing denied,* 31 N. E. 581 (1892); Matson v. Bauman, 139 Minn. 296, 166 N. W. 343 (1918).

9. These are set forth and fully discussed in Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311, 320-327. Professor Lorenzen demonstrates very clearly that the Statute of Frauds, examined in the light of its treatment by the courts, is regarded by them as substantive, rather than as an evidentiary or "procedural" matter.

10. See GOODRICH, CONFLICT OF LAWS (1927) 175, 176; (1928) 27 MICH. L. REV. 225.

11. The rule requiring adherence to the forum's procedure is said to be based on the court's convenience. See GOODRICH, CONFLICT OF LAWS (1927) 157; Lorenzen, *supra* note 9, at 325; Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1932) 42 YALE L. J. 333.

1. 48 STAT. 798, 11 U. S. C. A. §§ 301-303 (Supp. 1934).

2. 30 STAT. 544 (1898), 11 U. S. C. A. §§ 1 *et seq.* (1927).

3. TEX. COMP. STAT. (1928) §§ 7622-7807.

4. U. S. CONST. Art. I, § 8, cl. 4.

5. M'Culloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Collector v. Day, 11 Wall. 113 (U. S. 1870).

6. 11 Wall. 113 (U. S. 1870).

7. The doctrine of Collector v. Day has been consistently followed. Pollock v. Farmers Loan & Trust Co., 157 U. S. 429 (1895); Indian Motocycle Co. v. United States, 283 U. S. 570 (1931); Boudin, *The Taxation of Government Instrumentalities* (1934) 22 GEO. L. J. 254; Note (1931) 38 W. VA. L. Q. 59.

the court applied that doctrine, holding that petitioner, being created by the state for public purposes, and having for its object the administration of a portion of the powers of the state (*i. e.*, the taxing power), was an agency of the state.[8] However, the doctrine of *Collector v. Day* is distinguishable from the situation in the instant case on two bases. (1) While a tax is unquestionably a *burden* upon the state agency, debt readjustment appears to be a *benefit*. (2) While a tax is *forced* upon a state agency, the Sumners Act gives federal courts jurisdiction only when the state agency *voluntarily* submits thereto,[9] and further, permits the state to forbid its governmental units to resort to federal courts for debt readjustment.[10] Thus, state control would seem to be adequately preserved. Conceding, for the purpose of argument, that the Constitution prohibits Congress from extending its bankruptcy powers to insolvent state agencies, it is submitted that this limitation is waived by the state when, without objecting, it permits its agent to take advantage of the relief offered. In view of the consistent tendency in the past to uphold the bankruptcy power of Congress,[11] the court might well have decided the instant case differently. Since the states do not possess the power to relieve insolvent debtors from pre-existing obligations,[12] the result is to deprive debt-burdened state agencies of any relief whatever.[13]

CONSTITUTIONAL LAW—DUE PROCESS—PRIVILEGES AND IMMUNITIES—SERVICE OF PROCESS UPON NONRESIDENT INDIVIDUAL—An Iowa statute provided that when an "individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency." [1] The statute had been interpreted by the state court to apply to nonresident, as well as to resident, principals.[2] Service was made upon a nonresident in an action for breach of contract. The defendant appeared specially. *Held,* that the service conferred jurisdiction, the statute authorizing it neither violating "due process" nor infringing defendant's "privileges and immunities." *Henry L. Doherty & Co. v. Goodman,* U. S. L. Week, April 2, 1935, at 26 (Sup. Ct. 1935).

The constitutional problem before the Court was the same passed upon by the Pennsylvania court in *Stoner v. Higginson,* discussed recently in this REVIEW.[3] Both cases acheived the same result, which, as indicated in the previous discussion, has theoretical support, as well as the advantage of serving a realistic

8. An irrigation district is a "quasi-corporation", an agency of the sovereign. Central Irrigation District v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); Crow Creek Irrigation District v. Crittenden, 71 Mont. 66, 227 Pac. 63 (1924); 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 37; 1 MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 135.

9. *Cf.* Massachusetts v. Mellon, 262 U. S. 447 (1923).

10. 48 STAT. 802, 11 U. S. C. A. § 303 (k) (Supp. 1934).

11. Hanover National Bank v. Moyses, 186 U. S. 181 (1902); *In re* Klein, Fed. Cas. No. 7,865 (D. Mo. 1843); Leidigh Carriage Co. v. Stengel, 95 Fed. 637 (C. C. A. 6th, 1899).

12. Because of the constitutional prohibition, applicable to states only, against impairing the obligation of contracts. U. S. CONST. Art. I, § 10, cl. 1. Sturges v. Crowninshield, 4 Wheat. 122 (U. S. 1819).

13. For a discussion of the constitutionality of the Sumners Act, see Briggs, *Shall Bankruptcy Jurisdiction be Extended to Include Municipalities and Other Taxable Subdivisions?* (1933) 19 A. B. A. J. 637; *Municipal Bankruptcy* (1933) 7 J. NAT. ASS'N REF. BANK. 164; Wood, *Constitutionality of the Sumners Municipal Relief Bill* (1934) 10 A. B. REV. 175; Note (1934) 43 YALE L. J. 924, 972; Opinion of the Attorney General, issued April 21, 1933, C. C. H. BANKRUPTCY LAW SERVICE 957.

1. IOWA CODE (1931) § 11079.

2. Davidson v. Doherty, 214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1327 (1934); Goodman v. Henry L. Doherty & Co., 255 N. W. 667 (1934).

3. 316 Pa. 481, 175 Atl. 527 (1934), (1935) 83 U. OF PA. L. REV. 683.

social policy. The United States Court, like the Pennsylvania court and the Iowa court before it,[4] distinguished *Flexner v. Farson*[5] on the ground that in that famous case the alleged agent had not actually been such at the time of service. While that fact undoubtedly existed, it was buried in the pleading; Mr. Justice Holmes' opinion proceeded on an opposite hypothesis. The end, however, justifies the devious means. Still open to question is the validity of a statute which applies the substitute service to a nonresident only. While such a statute does in fact distinguish between residents and nonresidents, the discrimination is more academic than real. And in view of the fact that a "literal and precise equality" is not required,[6] it is to be expected that such a statute would also be upheld.

CRIMINAL LAW—DEFENSES—EFFECT OF PROMISE OF PARTIAL IMMUNITY TO ACCUSED WHO TURNS STATE'S EVIDENCE—Defendant was induced to testify against a confederate in a homicide through promises of the District Attorney to recommend that a plea of guilty of murder in the second degree be accepted. Defendant's testimony was instrumental in securing the confederate's conviction for first degree murder. Defendant was then tried and convicted of first degree murder, the Court refusing, despite the recommendation of the District Attorney, to accept his plea of guilty in the second degree. *Held* (one Justice dissenting), that the conviction be upheld, the court's refusal to accept the plea of guilty having constituted no error. *Frady v. People,* 40 P. (2d) 606 (Colo. 1934).

The practice of extending to an accused a promise of immunity from prosecution in return for his testimony against his confederates has long been recognized by the courts[1] as an apparently necessary evil inherent in the apprehension and conviction of criminals. While this is patently a judicial sanction to the promotion of perfidy among thieves, the public policy of the state is deemed to be well served, since persons are thereby convicted who would otherwise have escaped punishment.[2] Some courts have recognized this practice to the fullest extent by permitting the defendant who has rendered a full confession[3] to plead the promise of immunity as a complete bar to the prosecution.[4] Most courts, however, while recognizing an "equitable right" in the defendant, have been loath to fulfill the promise made by an officer of the state to the extent of allowing it to constitute a legal defense.[5] The defendant is considered amply recom-

4. Cases cited *supra* notes 2 and 3.
5. 248 U. S. 289 (1919).
6. Hess v. Pawloski, 274 U. S. 352, 356 (1927).

1. See 4 BL. COMM. *330, where it is said that by the ancient doctrine of approvement a party to a felony could accuse his accomplice of the same crime, and if the accomplice was convicted, could himself obtain a pardon. Under the modern practice, the accomplice need not be convicted in order that the defendant benefit from his testimony.

2. See Whiskey Cases, 99 U. S. 594, 605 (1878); Ingram v. Prescott, 111 Fla. 320, 321, 322, 149 So. 369 (1933).

3. Where the defendant testifies falsely, he cannot benefit from the agreement made with him. Cox v. State, 69 S. W. 145 (Tex. Cr. 1902).

4. Camron v. State, 32 Tex. Cr. App. 180, 22 S. W. 682 (1893); People v. Bogolowski, 326 Ill. 253, 157 N. E. 181 (1927).

5. Whiskey Cases, 99 U. S. 594 (1878); Commonwealth v. Joseph St. John, 173 Mass. 566, 54 N. E. 254 (1899); State v. Graham, 41 N. J. L. 15 (1879). Of course, in those states where the prosecuting attorney may enter a *nolle prosequi* without the consent of the court, the defendant may receive his immunity regardless of the practice of the court. See Note (1930) 69 A. L. R. 240. Where, however, the *nolle prosequi*, as is the case in most states, may be entered only with the consent of the court, it may exercise its discretion as to whether to receive it. See Ingram v. Prescott, 111 Fla. 320, 323, 149 So. 369, 370 (1933), where it is said that it is the practice of the court to *nolle prosequi* and dismiss the prosecution.

pensed, and the dignity of the state fully preserved, by granting him a continuance so that he may petition for executive clemency, or, if he has been convicted, by a judicial recommendation for a pardon.[6] Although, in strict parlance, the defendant is not thereby accorded any legal right, yet practically the result assumed to be attained is identical with that of those courts which grant him a legal defense, and the same policy is effectuated.[7] In the principal case the court in refusing to accept the plea of guilty or to recommend executive clemency ignored the established practice and fundamental policy exemplified in the decisions it professed to follow, while extracting from them the highly theoretical concept of lack of legal right in the defendant, which it utilized to support its decision. The recognition of a duty in the trial court to accept a plea of guilty to a lesser crime would seem a highly desirable improvement over the prevailing practice of the courts in shifting to the pardoning power their responsibility of maintaining the state's integrity.

DESCENT AND DISTRIBUTION—PERSONS ENTITLED AND THEIR RESPECTIVE SHARES—RIGHT OF A MURDERER'S ADMINISTRATOR TO SHARE IN THE ESTATE OF THE VICTIM—A coroner's jury found as a fact that a son killed his mother, and then commited suicide. By will, the mother had left her property solely to the son. The son's administrator claimed the mother's estate under the intestacy laws.[1] *Held,* that though no exceptions were made in the statute of descent,[2] public policy prevents a murderer's estate from claiming any share under the victim's intestacy. In re *Sigsworth,* 104 L. J. R. 46 (Ch. Div. 1934).

This was a case of first impression in England dealing with the right of a murderer's representative to claim a share in the victim's estate under a statute of descent. As was indicated in the discussion of a recent Pennsylvania case[3] in an earlier issue of this REVIEW,[4] the decision in the instant case represents a desirable result, perhaps the more commendable in that it was attained without the aid of a specially engrafted exception to the statute.

GARNISHMENT—RIGHT OF LIEN CREDITOR TO IMPOUND IN HANDS OF AGENTS OF FEDERAL GOVERNMENT PROPERTY BEING SENT TO FARMER FOR CROP REDUCTION—Tenant, in pursuance of a crop-control contract with the Secretary of Agriculture, plowed up cotton on landlord's property, in return for which he was to be sent a check payable to himself and options to repurchase cotton to the extent of that destroyed. While the check and options were in the hands of agents of the Secretary of Agriculture for delivery to tenant, landlord brought a creditor's bill in which he sought to impound the check and options, in order to protect his lien[1] upon them for rent. *Held,* that the property could

6. See Whiskey Cases, 99 U. S. 594, 606 (1878); State v. Graham, 41 N. J. L. 15, 21 (1879). In the instant case, Butler, J. (concurring) abided by these decisions, stating that the court should recommend to the Governor a commutation of sentence.

7. In Whiskey Cases, 99 U. S. 594, 606 (1878), it was said in answer to the objection that the application for pardon might not be successful, that the court will not presume that the equitable title to mercy which the criminal has will not be accorded full credit by the pardoning power.

1. The son's estate treated the will as ineffective because of the homicide.

2. ADMINISTRATION OF ESTATES ACT, 10 HALSBURY'S LAWS OF ENGLAND (1933) 572.

3. Tarlo's Estate, 315 Pa. 321, 172 Atl. 139 (1934).

4. (1934) 83 U. OF PA. L. REV. 97.

1. The landlord's lien against the crops for rent was not extinguished by their destruction, but continued against the proceeds thereof, since there was no waiver by the landlord of his lien by consent to the destruction of the crops or otherwise, and the proceeds had not been transferred for value to a *bona fide* third party. See 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) § 464.

be impounded, the agents not being immune from the process because of their governmental position. *Graves Bros., Inc. v. Lasley,* 78 S. W. (2d) 810 (Ark. 1935).

Judgment creditor of farmer sought to garnish checks in the hands of agents of the Secretary of Agriculture, intended for the judgment debtor under a crop-reduction contract. *Held,* that the checks could not be reached by the process, the agents being immune because engaged in governmental operation, which otherwise would be interfered with. *Works & Rhea v. Shaw,* 156 So. 81 (La. App. 1934).

Most courts have, in the absence of statute, persisted in an unqualified refusal to afford to creditors the advantages of garnishment against various governmental agencies.[2] This policy is said to be based in part on the public interest in relieving government agencies from the burdens of defending suits in which they have no interest, and in inducing persons who are essential parties to governmental work to deal with the government by giving them an immunity from garnishment of the price of their services during the time that such public work is being rendered.[3] But the inconvenience of answering garnishment proceedings would seem actually to be slight. Such suits are not numerous, and where the obligation of the public body is admitted,[4] involve merely payment into court of the amount of the obligation. A few courts have therefore repudiated the immunity doctrine as it relates to various types of public corporations.[5] But where the attempted garnishee of a debt is a state or federal official, the courts have not relaxed the rule.[6] Where, as in the instant cases, the government does not resist payment of the obligation, and where in addition payment to the creditor instead of to the principal debtor would in no wise interfere with the government's purposes, there would seem to exist no justification for the time-honored rule forbidding garnishment. Such a situation would be similar to that in which a court's purposes in retaining property seized by a sheriff, are no longer operative. In such cases, courts have properly permitted garnishment of the funds in the hands of the sheriff.[7] Both the instant courts purported to recognize the policy that only to the extent that a clear and serious

2. Riggin v. Hilliard, 56 Ark. 476, 20 S. W. 402 (1892) (county); Irilarry v. San Diego, 186 Cal. 535, 199 Pac. 1041 (1921) (debts incurred by city in maintaining a water system); Dollman v. Moore, 70 Miss. 267, 12 So. 23 (1892) (school district); Fairbanks Co. v. Kirk, 12 Pa. Super. 210 (1889) (debt owed by city as trustee of charitable trust); Fordham, *Garnishment of Public Corporations* (1933) 39 W. VA. L. Q. 224; 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) 469.

3. DILLON, *loc. cit. supra* note 2.

4. It might be argued that even where the public body denies liability to the principal debtor, it would be no more inconvenienced in defending it against the creditor than against the principal debtor.

5. Rodman v. Mussleman, 12 Bush. 354 (Ky. 1876); Dunkley v. McCarthy, 157 Mich. 339, 122 N. W. 126 (1909); Hibbard v. Clark, 56 N. H. 155 (1875) (municipalities); Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66 (1914); Waterbury v. Deer Lodge County, 15 Mont. 515, 26 Pac. 1002 (1891); Adams v. Tyler, 121 Mass. 380 (1876) (counties). A few courts have adopted the doctrine of "equitable garnishment", which permits a governmental agency to be joined as a defendant in an equitable proceeding upon showing the insolvency of the principal debtor and the inadequacy of legal process. Wharf Improvement Dist. v. United States Gypsum Co., 181 Ark. 288, 25 S. W. (2d) 425 (1930); De Field v. Harding Dredge Co., 180 Mo. App. 563, 157 S. W. 593 (1914); Fordham, *supra* note 2, at 237. *Contra:* McConnell v. Floyd County, 164 Ga. 177, 137 S. E. 919 (1927); Dow v. Irwin, 21 N. M. 576, 157 Pac. 490 (1916); Clark v. Board of Comm'rs, 62 Okla. 7, 161 Pac. 791 (1916).

6. Buchanan v. Alexander, 4 How. 20 (U. S. 1846) (purser of U. S. frigate); O'Neill v. Sewell, 85 Ga. 481, 11 S. E. 831 (1890) (trustees of state asylum); Dewey v. Garvey, 130 Mass. 86 (1880) (trustees of state hospital).

7. Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518 (1891); Laurel Mills v. Ward, 137 Miss. 221, 102 So. 263 (1924); Turner v. Gibson, 105 Tex. 488, 151 S. W. 793 (1912); (1925) 10 MINN. L. REV. 65.

interference with governmental purposes is threatened should a creditor be denied his remedy of garnishment. The Louisiana court found such interference in the probability that permitting garnishment would lessen the willingness of the tenant farmer to cooperate with future programs of the same nature,[8] and in the certainty that it would nullify the relief features of the present program. In view of the wretched economic state of the Arkansas sharecropper,[9] the latter consideration should have been especially compelling in the *Graves* case.

HOMICIDE—MURDER—RIGHT OF DEFENDANT TO APPEAL FROM VERDICT OF SECOND DEGREE MURDER WHERE EVIDENCE INDICATES MURDER BY TORTURE—Defendants were charged with murder alleged to have been committed by means of torture—first degree murder under a statute.[1] They were convicted of second degree murder under instructions that if the killing by torture was accompanied by malice aforethought to effect death, but not by deliberation, it was murder in the second degree. *Held,* on appeal (two justices dissenting), that defendants be discharged, on the ground that evidence to prove the information could not prove second degree murder, and that defendants were entitled to a verdict of either guilty of first degree murder or not guilty. *State v. Reed,* 39 P. (2d) 1005 (N. M. 1934).

Where the degree of murder is governed by the quality of the *mens rea,* it has universally been held that evidence which will satisfy the requirements of first degree murder will sustain a conviction of second degree murder.[2] Where, however, the degree of murder is to be ascertained solely from the means employed to effect death, a number of courts have consistently maintained that the lesser degree of murder was not included within the greater, because the element of "deliberation", necessary to raise murder to the first degree, was conclusively presumed to exist if the given means had been employed.[3] Factually, the exception may be predicated on the theory that whereas in the former case the jury might find that murder was actually committed even though rejecting the clearest of evidence that it was wilful, deliberate and premeditated,[4] yet where the evidence tended to show that the murder was perpetrated by a particular means, the possibility of murder committed by any other means was necessarily excluded;[5] and thus, as corollary, that a second degree verdict in the latter event

8. Legislation is now before Congress authorizing extension of the crop-control program through the 1936-1937 crop year. N. Y. Times, Jan. 20, 1935, § 2, at 9; *cf. id.,* Jan. 31, 1935, at 29.

9. N. Y. Times, Feb. 28, 1935, at 4.

1. N. M. STAT. ANN. (1929) § 35-304, which provides that "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of wilful, deliberate, and premeditated killing . . . shall be deemed murder in the first degree."

2. State v. Ostrander, 30 Mo. 13 (1860); Fuller v. State, 30 Tex. App. 559, 17 S. W. 1108 (1891); State v. Underwood, 35 Wash. 559, 77 Pac. 863 (1904).

3. Eytinge v. Territory, 12 Ariz. 131, 100 Pac. 443 (1909); Dickens v. People, 67 Colo. 409, 186 Pac. 277 (1919); see People v. Sanchez, 24 Cal. 17, 29 (1864).

4. But see Kendrick v. State, 113 Ga. 759, 39 S. E. 286 (1901), where on an indictment of assault with intent to murder alleged to have been committed by shooting, proof of the crime was held not to warrant a conviction of the statutory offense of unlawfully shooting at another. The court said that "if the evidence for the state, if believed, demanded a verdict of guilty of the crime charged in the indictment, and the evidence for the defendant, if accepted as true, demands an absolute acquittal, a verdict finding him guilty of a lesser offense of the same general character is contrary to evidence and to law."

5. In Dickens v. People, 67 Colo. 409, 186 Pac. 277 (1919), the court accepted this statement although the charge was murder perpetrated by means of lying in wait. Yet on the theory that the jury may choose to believe what it will, provided its finding of fact be supported by sufficient evidence, it might have found that the murder was committed, though not by means of lying in wait. So in the instant case the jury might have found that murder was

represented, at best, a compromise, which the defendant should not be required to accept.[6] The court rejected as inapplicable a recent statute permitting the jury to find defendants guilty of any offense the commission of which is necessarily included in that with which they are charged,[7] on the ground that it related solely to the forms of indictments and informations, and so dispensed only with the necessity of pleading first and second degree in separate counts.[8] A more realistic, though less logical, approach would deny defendants the right to complain if convicted of a lesser degree of homicide than that charged, provided the evidence clearly supported the more serious charge.[9] To uphold the latter view is merely to support the contention that defendants should not be allowed to chance death as against complete freedom in the hope that a judge or jury may feel disinclined to visit the extreme penalty attached by law to the minimum finding of fact.

TORTS—DUTIES TO THIRD PERSONS—RIGHT OF POLITICAL CANDIDATE TO RECOVER FROM VOTING MACHINE COMPANY FOR NEGLIGENCE IN SETTING MACHINES—Defendant company had contracted with municipality to set up voting machines. Plaintiff, a political candidate, actually received enough votes for his election, but the machines had been improperly set; a vote for either of plaintiff's two rivals registered as a vote for both of them. Plaintiff sued for the cost of having the tabulation of the machines set aside. *Held,* that defendant was not liable, since he owed plaintiff no duty either in tort or as a third party beneficiary of the contract with the city. *Creedon v. Automatic Voting Machine Corp.,* 276 N. Y. Supp. 609 (App. Div., 4th Dep't 1935).

In holding that plaintiff was not a third party beneficiary of the contract,[1] the court followed the great weight of authority. Since the contract expressed no intention to confer a right of action on the candidates, they were not donee beneficiaries; and since the city itself would not have been liable for the failure of the voting machines, plaintiff was not a creditor beneficiary.[2] As for the alleged tort liability, the problem of to what persons a duty is owed is one of the most nebulous in tort law.[3] Speaking generally, there is a duty to refrain from action which would directly injure others. There is, however, no duty to another to

committed though not by means of torture. This would be impossible, however, in most cases where torture is alleged. Where the only evidence indicates death by poison no other choice is possible.

6. See State v. Pruett, 27 N. M. 576, 203 Pac. 840 (1921); *cf.* State v. Dowd, 19 Conn. 388 (1849); State v. Lindsey, 19 Nev. 47 (1885). In both the latter cases, convictions of second degree murder were upheld. The applicable statutes provided that "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any *other* kind of wilful, deliberate and premeditated killing, . . . shall be deemed murder in the first degree."

7. N. M. STAT. ANN. (1929) § 35-4409.

8. Principal case at 1008. The majority view was based largely on the title of the statute. The dissenting justices argued that the scope of the statute was far broader, because of the circumstances surrounding its adoption (at 1011), and because of the language used (at 1013). See CODE OF CRIMINAL PROCEDURE (Am. L. Inst. 1930) § 345.

9. Bennett v. State, 95 Ark. 100, 128 S. W. 851 (1910); State v. Yargus, 112 Kan. 450, 211 Pac. 121 (1922); Lane v. Commonwealth, 59 Pa. 371 (1868).

1. German Alliance Ins. Co. v. Homewater Supply Co., 226 U. S. 220 (1912); Moch Co. v. Rensselaer Water Co., 247 N. Y. 160, 159 N. E. 896 (1928); Note (1927) 12 CORN. L. Q. 207; 1 WILLISTON, CONTRACTS (1924) § 373. *Contra:* Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554 (1889); Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720 (1899).

2. See Note (1910) 58 U. OF PA. L. REV. 555; RESTATEMENT, CONTRACTS (1932) § 145; 1 WILLISTON, CONTRACTS (1924) §§ 373, 374.

3. See Bohlen, *The Basis of Affirmative Obligations in the Law of Torts* (1905) 53 U. OF PA. L. REV. 209; 1 BEVEN, NEGLIGENCE (4th ed. 1928) 8-15; HARPER, TORTS (1933) § 76.

refrain from doing negligently acts on which the other may rely, and so be injured, unless there is privity of contract between the plaintiff and defendant,[4] or unless the negligent act of the defendant may result in serious bodily harm.[5] The continuously widening field of liability for torts was extended in *Glanzer v. Shephard*,[6] to hold a public weigher liable to a vendee for negligently weighing bags of beans, under a contract with the vendor. This decision has been limited by later decisions to situations where the defendant should reasonably realize that his action will be relied on by the plaintiff or the group of which he is a member, provided this group is small in number.[7] This restriction is based on practical reasons. The courts do not wish to place on those companies whose work is relied upon by a large number of the public so large a burden as to force them out of business because of their first mistake.[8] The number of candidates likely to be injured by errors in the setting of a few voting machines, however, appears to be sufficiently small to fall within the rule of *Glanzer v. Shephard*. However, an essential element of that case seemed lacking in the instant case. There was no allegation that plaintiff had any knowledge of the contract between the city and defendant; therefore he could not have relied upon it. The decision in *Moch Co. v. Rensselaer Water Co.*[9] that a water company is not liable to a citizen for failure to maintain the water pressure required by the former's contract with the city, suggests that *Glanzer v. Shephard* will be restricted to situations in which the plaintiff has acted to his detriment in reliance on the defendant's faithful performance of his contract.[10]

WORKMEN'S COMPENSATION ACTS—CONSTRUCTION—INJURIES SUSTAINED IN COURSE OF EMPLOYMENT FOR WHICH NO RECOVERY IS PROVIDED IN ACT—The constitution of Ohio, in providing for the establishment of a state fund for the compensation of workmen injured in the course of their employment, stipulated that any employer contributing "shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."[1] Plaintiff alleged that defendant employer, a contributor to the state fund, caused her to work long hours in violation of the Minimum Hour Law,[2] and that she thereby sustained a nervous breakdown—an injury not compensable under the Workmen's Compensation Act.[3] *Held* (one judge dissenting),

4. See (1923) 71 U. OF PA. L. REV. 209; Bohlen, *loc. cit. supra* note 3; HARPER, TORTS (1933) 178.

5. See MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N. W. 855 (1928); Bohlen, *Liability of Manufacturers to Persons other than Their Immediate Vendees* (1929) 45 L. Q. REV. 343; HARPER, TORTS (1933) § 106.

6. 233 N. Y. 236, 135 N. E. 275 (1922), (1923) 71 U. OF PA. L. REV. 286; International Products Co. v. Erie R. R., 244 N. Y. 331, 155 N. E. 662 (1927).

7. Jaillet v. Cashman, 235 N. Y. 511, 139 N. E. 714 (1923); Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1930), 44 HARV. L. REV. 134, (1931) 79 U. OF PA. L. REV. 364.

8. HARPER, TORTS (1933) § 76; see dissenting opinion of Finch, J., in Ultramares Corp. v. Touche, 229 App. Div. 581, 243 N. Y. Supp. 179, 186 (1st Dep't 1930).

9. 247 N. Y. 160, 159 N. E. 896 (1928).

10. See Note (1928) 13 CORN. L. Q. 616, for a suggestion that the doctrines of Glanzer v. Shepard and of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916), might have been extended to impose tort liability in the waterworks cases.

1. OHIO CONST. art. II, § 35, as amended.

2. OHIO CODE (Throckmorton, 1930) § 12996.

3. Since the nervous breakdown did not result from a specific event, it is settled that there can be no recovery for this under the workmen's compensation statutes as an "injury." Smith v. International High Speed Steel Co., 98 N. J. L. 574, 120 Atl. 188 (1923); Jones v. Rhinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S. E. 482 (1933). Neither can it be brought within the scope of the act as an occupational disease. See Industrial Comm. of Ohio v. Roth, 98 Ohio St. 34, 38, 120 N. E. 172, 173 (1918); 1 SCHNEIDER, WORKMEN'S COMPENSATION LAW (2d ed. 1932) § 223.

that a demurrer to the declaration was properly sustained, because the constitutional amendment had taken away all common law rights of an employee against his employer for injuries sustained in the course of employment. *Mabley & Carew Co. v. Lee*, 193 N. E. 745 (Ohio 1934).

Recovery under Workmen's Compensation Acts is generally made exclusive.[4] Many states, however, provide by statute that the remedy shall be exclusive only as to injuries for which recovery is provided under the act.[5] Others, whose statutes do not contain such express limitation, have construed them to contain it impliedly.[6] West Virginia, for example, has interpreted a statute broader than that involved in the instant case as not abrogating the common law remedy against the employer for injuries non-compensable under the act, reasoning that the statute must be construed in conjunction with the reasons for its creation.[7] New York [8] and Kentucky [9] have construed similar statutes in the same way. In the instant statute, the term *"such* injuries" might well have been interpreted to mean injuries *for which compensation is provided.* Where there is ground for choice of interpretations, that one most consistent with the manifest object of the legislature should be preferred. The Workmen's Compensation Acts were enacted for the purpose of providing a more convenient and less expensive means of recovery for employees injured in the course of their employment.[10] They abolished many of the common law defenses,[11] and

4. REV. STAT. KAN. (1923) § 44-501; MINN. STAT. (Mason, 1927) §§ 4269, 4270; REV. STAT. WASH. (Remington, 1932) § 7673; see (1921) 5 MINN. L. REV. 241, 242.

5. REV. STAT. KAN. (1923) § 44-501; GEN. LAWS MASS. (1932) §§ 23, 24; COMP. LAWS MICH. (1929) § 8410; IOWA CODE (1931) § 1363.

6. Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S. W. 972 (1923); Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 201 N. W. 305 (1924), (1925) 9 MINN. L. REV. 389; Smith v. International High Speed Steel Co., 98 N. J. L. 574, 120 Atl. 188 (1923); Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423 (1st Dep't 1915), 64 U. OF PA. L. REV. 197; Jones v. Rhinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S. E. 482 (1933). *Contra:* Webb v. Tubize-Chatillon Corp., 45 Ga. App. 744, 165 S. E. 775 (1932); Gordon v. Travelers Ins. Co., 287 S. W. 911 (Tex. Civ. App. 1926), (1927) 5 TEX. L. REV. 294.

7. The statute reads: "Any employer (paying the premiums) shall not be liable to respond in damages at common law or by statute for the injuries or death of any employee, however occurring. . . ." Jones v. Rhinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S. E. 482 (1933). Washington has an equally broad statute. REV. STAT. WASH. (Remington, 1932) § 7673. The precise problem presented by the instant case does not appear to have been before the court, but the language used in a case permitting recovery in a common law action by an employee injured in another state, is significant: "The common law is contemned . . . because the remedy is deemed inadequate. This is far from a declaration of a policy which would refuse that remedy where that remedy is the only alternative." Reynolds v. Day, 79 Wash. 499, 505, 140 Pac. 681, 684 (1914).

8. Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423 (1st Dep't 1915), 64 U. OF PA. L. REV. 197. The statute provided that "the liability . . . prescribed by the last preceding section shall be exclusive." Plaintiff recovered for injuries sustained through his ear being bitten by a horse belonging to the employer. The Shinnick case was disapproved, but not expressly overruled, in Connors v. Semet-Solvay Co., 94 Misc. 405, 159 N. Y. Supp. 43 (Sup. Ct. 1916) and Repka v. Fedders Mfg. Co., 239 App. Div. 709, 267 N. Y. Supp. 709 (4th Dep't 1933). But it was followed in Trout v. Wickwire Spencer Steel Corp., 195 N. Y. Supp. 528 (Sup. Ct. 1922).

9. Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S. W. 972 (1923). The statute provided that the employer "shall be released from all other liability whatsoever." The employer violated a statute against permitting miners to work more than sixty feet down from a breakthrough, whereby plaintiff received injuries which were not compensable under the act. The court, in allowing recovery at common law, stated: "It is inconceivable that the legislature, after providing such laws should have intended to leave them without any provision for enforcement" (referring to the safety statute). *Id.* at 690, 247 S. W. at 975. This argument is equally applicable in the instant case, since if no recovery is permitted for violation of the minimum hours statute, it would appear to be of no benefit to the employees.

10. See Young v. Duncan, 218 Mass. 346, 349, 106 N. E. 1, 3 (1914); Reynolds v. Day, 79 Wash. 499, 505, 140 Pac. 681, 684 (1914), cited *supra* note 7.

11. 1 SCHNEIDER, *op. cit. supra* note 3, at 69.

in return provided for the bearing of the expense of the injuries by the industry as a whole. From this it would appear that the purpose behind them is to broaden the rights of the workman, and hence that a construction narrowing this right is contrary to their aim.[12] Where the injury is within the scope of the act, the respective rights of the employer and employee have been weighed and determined. The employer has done his part by the payment of the premiums. But where the injury is outside the scope of the act, no right has been provided the employee; and the employer has parted with nothing, since allowance for such injuries has not been included in the premiums. No additional burden has been placed upon the employer, and there is therefore no injustice in retaining the common law remedy against him.

WORKMEN'S COMPENSATION ACTS—CONSTRUCTION—TIME OF OCCURRENCE OF "DISABILITY" FROM OCCUPATIONAL DISEASE—The Wisconsin Workmen's Compensation Act provides that "liability for compensation shall exist against an employer for any disability sustained by his employe . . . where, at the time of the injury, both the employer and employe are subject to the provisions of" the Act.[1] Occupational diseases are made compensable.[2] Plaintiff, prior to a general physical examination of its employees at the insistence of a prospective insurer, discharged all employees. Certain workers were found to be suffering from silicosis [3] and, although none had theretofore been caused any wage loss by the illness, were advised that resumption of their dusty occupations would aggravate their condition to a dangerous degree. Plaintiff accordingly refused them reemployment. This action was brought to set aside an award of compensation ordered by the Industrial Commission. *Held,* that the award be set aside, since claimants had sustained no disability while in plaintiff's employ. *North End Foundry Co. v. Industrial Comm.,* 258 N. W. 439 (Wis. 1935).

Only fourteen American jurisdictions offer compensation for occupational diseases.[4] Five of these give protection solely to certain ailments enumerated in a definite "schedule",[5] and the rest have a more or less general provision covering all such infirmities.[6] Most provisions concerning occupational diseases, sub-

12. Cases holding that there is no additional recovery for injuries for which compensation has been paid are not inconsistent with this policy, since the *amount* of recovery has been purposefully fixed. Heyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 555 (1920), (1920) 5 MINN. L. REV. 241; Connors v. Semet-Solvay Co., 94 Misc. 405, 159 N. Y. Supp. 431 (Sup. Ct. 1916).

1. WIS. STAT. (1931) 102.03 (1), (a).

2. *Id.,* 102.01 (2).

3. A form of pneumoconiosis, contracted by inhaling quantities of silica dust, characterized by gradual loss of normal lung function, and usually, ultimately, associated with the development of pulmonary tuberculosis. See 12 ENCYC. BRITT. (14th ed. 1929) 309; 15 *id.* at 533.

4. See JONES, DIGEST OF WORKMEN'S COMPENSATION LAWS (12th ed. 1931) *passim;* U. S. Dep't of Labor, Bureau of Labor Statistics, Bull. No. 603 (1933) 61. The Massachusetts Act, providing compensation only for "personal injury", has been judicially construed to cover occupational diseases. Hurle's Case, 217 Mass. 223, 104 N. E. 336 (1914); Johnson's Case, 217 Mass. 388, 104 N. E. 735 (1914); BRADBURY, WORKMEN'S COMPENSATON LAW (3d ed. 1917) 7 *et seq.;* Beers, *Compensation for Occupational Diseases* (1928) 37 YALE L. J. 579, 584, 585.

5. *Viz.,* Illinois (by separate Occupational Diseases Act), Minnesota, New Jersey, Ohio, Puerto Rico. JONES, *op. cit. supra* note 4; U. S. Dep't of Labor Bull., *supra* note 4; *cf.* Wilcox, *The "Schedule" Fraud in Occupational Disease Compensation* (1934) 24 AM. LAB. LEG. REV. 119.

6. *Viz.,* California, Connecticut, District of Columbia, Hawaii, North Dakota, Philippines, Wisconsin, federal jurisdiction. JONES, *op. cit. supra* note 4; U. S. Dep't of Labor Bull., *supra* note 4. New York on March 26, 1935, substituted a blanket provision for its earlier schedule. N. Y. Laws, 1935, c. 254, N. Y. L. J., Mar. 28, 1935, at 1570.

sequent additions to an original act omitting them, leave "disability" thereunder to be determined according to the standards applicable to accidental injuries.[7] Consequently, the point at which "disability" occurs within the meaning of the statute becomes an essential question in cases involving industrial maladies. This point may be fixed at (1) the *contraction* of the disease, (2) the first noticeable physical *impairment* due to the disease, or (3) the *culmination* of the diseased condition in an incapacity for work. If the first be determined upon, workmen might too often be unjustly barred by the time limitations contained in the statute; if the second, they might be prejudiced by the requirements of notice to the employer.[8] Hence the third construction has been universally accepted as the most humane solution.[9] The Wisconsin court, adopting this doctrine [10] and following it in a line of cases comprising various factual situations, has applied it almost invariably for the benefit of the employee.[11] The peculiar circumstances of the instant case, however, would have justified the instant court in holding the previous promulgation of the rule to be, for present purposes, mere *dictum*.[12] Alternatively, the court might have held that an employer's attempt to terminate the employer-employee status, where the endeavor represents a design to circumvent the compensation law, is ineffective to release him from liability.[13] On the other hand, the manifestly inequitable outcome of the instant case may serve as a goad to a sluggish legislature.[14] A simple amendatory pro-

7. See principal case at 442; Beers, *supra* note 4, at 582, n. 7.

8. The Wisconsin court has in the past recognized both these difficulties. See Employers Mutual Liability Ins. Co. v. McCormick, 195 Wis. 410, 414, 217 N. W. 738, 740 (1928); Zurich Gen. Accident & Liability Ins. Co. v. Industrial Comm., 203 Wis. 135, 144, 233 N. W. 772, 775 (1930); principal case at 442.

9. Marsh v. Industrial Accident Comm., 217 Cal. 338, 18 P. (2d) 933 (1933); Madison v. Wedron Silica Co., 352 Ill. 60, 184 N. W. 901 (1933); Johnson's Case, 217 Mass. 388, 104 N. E. 735 (1914); Textileather Corp. v. Great American Indemnity Co., 108 N. J. L. 121, 156 Atl. 840 (1931); *cf.* Marler v. Grainger Bros., 123 Neb. 517, 243 N. W. 622 (1932).

10. Employers Mutual Liability Ins. Co. v. McCormick, 195 Wis. 410, 217 N. W. 738 (1928); see Viesselman, *Compensation for Diseases Caused by Conditions of Employment* (1929) 2 DAK. L. REV. 337, 345.

11. Schaefer & Co. v. Industrial Comm., 185 Wis. 317, 201 N. W. 396 (1924) (apportioning liability among concurrent employers); Employers Mutual Liability Ins. Co. v. McCormick, 195 Wis. 410, 217 N. W. 738 (1928) (fixing liability on one of successive insurers); Zurich Gen. Accident & Liability Ins. Co. v. Industrial Comm., 203 Wis. 135, 233 N. W. 772 (1930) (recurrent attacks of silicosis); Outboard Motor Co. v. Industrial Comm., 206 Wis. 131, 239 N. W. 141 (1931) (successive employers); Wisconsin Granite Co. v. Industrial Comm., 208 Wis. 270, 242 N. W. 191 (1932) ("disability" occurred during lay-off); Kannenberg Granite Co. v. Industrial Comm., 212 Wis. 651, 250 N. W. 821 (1933) (voluntary resignation because of silicosis); Michigan Quartz Silica Co. v. Industrial Comm., 214 Wis. 492. 253 N. W. 167 (1934) (joint employers). But *cf.* Montello Granite Co. v. Industrial Comm., 197 Wis. 428, 222 N. W. 315 (1928) (employer withdrew from Act before "disability" occurred); Kimlark Rug Corp. v. Industrial Comm., 210 Wis. 319, 246 N. W. 424 (1933) (employee left after contraction of disease but before "disability").

12. See, as hinting at this possibility, Zurich Gen. Accident & Liability Ins. Co. v. Industrial Comm., 203 Wis. 135, 144, 273 N. W. 772, 776 (1930); Nordberg Mfg. Co. v. Industrial Comm., 210 Wis. 398, 402, 245 N. W. 680, 681 (1933).

13. A previous Wisconsin case decided that the status can be terminated only by the affirmative act of one of the parties. Wisconsin Granite Co. v. Industrial Comm., 208 Wis. 270, 242 N. W. 191 (1932). The requirement of good faith suggested in the text might easily have been engrafted upon this principle, especially because the employer's conduct, in view of the facts, seems clearly against "public policy." Moreover, such conduct is hardly rendered more admirable by the existence of the well known fact that silicosis may be prevented (or at least greatly reduced in probability) at comparatively slight expense by the use of proper ventilation, exhaust-hoods, dust-masks, or the process of "working wet." See 15 ENCYC. BRIT. (14th ed. 1929) 533.

14. See Wisconsin Granite Co. v. Industrial Comm., 208 Wis. 270, 278, 242 N. W. 191, 193 (1932); Nordberg Mfg. Co. v. Industrial Comm., 210 Wis. 398, 403, 245 N. W. 680, 681 (1933).

vision, like that in the English act, that the employee shall be entitled to compensation if he was an employee within a specified period of time previous to the date of disablement,[15] would help to fill a shockingly neglected gap in the law, and would ultimately operate to the economic welfare of the community as a whole.

15. A period of 12 months is specified in the English act. 11 HALSBURY'S STATUTES OF ENGLAND (1930) 580.